THE

POWER

OF THE

COMMANDER-IN-CHIEF

TO DECLARE

MARTIAL LAW,

AND DECREE

EMANCIPATION:

AS SHOWN FROM

B. R. CURTIS.

BY LIBERTAS.

BOSTON:
A. WILLIAMS & CO., 100 WASHINGTON STREET.
1862.

To the People of the United States

WHO PRIZE

THE BLESSINGS OF LIBERTY

WHICH THE

CONSTITUTION WAS ESTABLISHED TO SECURE.

REPLY.

Hon. B. R. Curtis.—

Sir: You will allow one of those to whom you dedicate your pamphlet, one sworn to support the Constitution, and a friend to the principles of civil liberty embodied in it, to reply to some of its doctrines, and state a few things that occur on reading it.

You assume that the matter of the Proclamation was intended only to be submitted to the people as matter of discussion, as you say; yet you do not seem to really think so when you take such pains to prepare your argument against the power which the President asserts for himself. I cannot think with you that there is nothing in the position of the country to prevent the exercise of this power from being called in question. On the contrary, you assume the gravest responsibility that an American can assume, in deliberately declaring that the exercise of the highest war power is the usurpation of military despotism.

In candor it must be said, that were you as pure a patriot as you think yourself to be, it would be expected that you would privately submit your views to the Executive who asserts this power, and if this did not change his opinions you would conscientiously abstain from giving public utterance to them.

For this is one of those cases in which the pen is mightier than the sword. If your argument can avail,

you will have done more for the traitor cause than all the rebel armies — for you will disband our own. Would an American citizen at this hour feel no restraint on giving utterance abroad to any views he might, however honestly, hold which would encourage that foreign element which is so hostile to our country and to our institutions? Are you less responsible at home?

No, sir; there is danger to our country from foreign states, not less than from rebel arms. There is danger, too, perhaps the greatest of all, of distraction in our own country. It is this you are now assuming to encourage (I will not say intentionally or even consciously) by the course you have taken.

What practical thing do you hope to effect by your argument? You assume in one place that it is to change the counsels of the President, as already hinted; then why not address him? Again you seem to intimate that the people should resist the operation of martial law. Indeed, you more than seem to challenge its application to yourself; but surely you would not wish to begin, nor to see others begin, such an opposition.

It is to be inferred, as you several times state that thirty days elapse after the meeting of Congress before the Proclamation is to take effect, that you hope rather to rally a Congressional opposition which will annul the Emancipation Proclamation, and declare these other Proclamations unconstitutional, as you hold them to be.

It is in this light that your arguments challenge consideration. No doubt you consider that you have divested yourself of "party ties." You do not dream that you are resuming your old party connections.

You sincerely think you can persuade the President or Congress to annul these Proclamations, and thus preserve their liberties. But while you address the people as being fully entitled to some weight, from the position you once held as a magistrate, you must expect that they will consider your old and matured opinions on matters that relate to this question, and which may bias your opinions (for you are mortal like the rest), as well as your knowledge of the laws. Indeed, any man who reads your condensed argument (on page 13) against the lawfulness, "in any Christian or civilized sense, of the use of such means as the Proclamation to attain *any* end," and your construction of it as invoking a servile war, will think that if you do not resume your party connections you do hold to your old opinions, and make due allowance for the influences which led you in earlier days to argue for the right of the master to come with his slaves to Massachusetts, and at a later time to give your earnest support to the Fugitive Slave Bill. They will remember, too, your protest against the judicial encroachments by the Dred Scott decision. Really, there are few persons more biased than you are on this topic. You naturally think the most vital things of the Constitution are its compromises, and incline to be jealous of all power that may disturb their balance.

Bearing in mind then the objects of your pamphlet, and the influences likely to color your thoughts and opinions, let your arguments be only considered and weighed for what they are worth in themselves.

Now the President asserts, and you say, that the source of the powers asserted by these Proclamations is the authority of Commander-in-Chief in time of war. This, you concede, is derived solely from the

Constitution. You admit, further, that it is as sufficiently defined there as his purely civil power.

The words of the Constitution are these: "The President shall be the Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States."

It is very well known that in framing the Constitution the original phrase used was "executive power," but when the committee of detail came to revise it, they thought, as it doubtless was wisest, instead of attempting to define, limit, or enumerate the war powers of the President, to sum them all up in this one comprehensive phrase, Commander-in-Chief. This, then, was used designedly as a source of power, and not merely as a description of an office or a function.

This is a thing to be borne in mind in these days, when the lovers of the old forms of government in the old countries are sneering at the impotency of popular government in time of war; and the friends of the slave power here now seek to save it by snatching the sword from the hand of the Commander sworn to wield it. The framers of the Constitution had seen the folly of risking the choice of Commander-in-Chief on the votes of States. They had seen and felt the need of a dictatorship under Washington. Strong lovers of liberty as they were, they knew that this highest national power was an essential condition for its support; that it must be reposed somewhere in the last resort, and they entrusted it to the Chief Magistrate of the people's choice.

This, however, is less important in weighing your argument, for you admit, as indeed you must, that

besides military law, that is, the system of laws framed by the legislature for government of the army and navy of the United States, martial law is equally well established.

You do indeed assert that the only judicial decisions which have been made touching the right of the Commander-in-Chief to suspend the writ of Habeas Corpus have been adverse to the power of the President. If so, it is not the first time that co-ordinate branches of the government have held to opinions which were not harmonious. Perhaps the best answer to this suggestion is, that the President, whose honesty you profess not to question, has, with the best lights, held to his own opinion.

But, sir, have not your studies shown you that there are precedents which give him good warrant in law for this action?

Have not your reflections led you to attach any weight to the fact that from the decision of the Commander and Executive head there can be no appeal? or any to those considerations growing out of the necessity of such a power to preserve national existence?

It is surprising that you should deign to refer, as it is to be presumed you do, to the decision of a judge against whose judgment you protested as usurpation; for if in those days he could assume political power, how much more would he be likely now to seek to wield it or control it? But in the case of Merryman, in June, 1861, the Chief Justice declared that the courts had had no notice, by "proclamation or otherwise, that the President claimed this power;" and the case was one of the arrest of a citizen of Maryland

by a subordinate military officer residing in Pennsylvania.

But it is needless to pursue the argument, for you have to concede the constitutionality of martial law.

You admit that a military commander has, under the Constitution, powers in time of war over the persons and property of citizens, which do not exist in time of peace: "The power to use the customary and necessary means effectually to carry war on," and that "without any special legislation."

You do, indeed, term this an implied power of the Commander-in-Chief. In one sense it is so; but you might as well say that judgment was an implied power of the judges, in whom the judicial power is vested. It is not implied in the sense of being only constructive or incidental. It is implied in the sense of being necessarily involved in the command with which he is invested.

Now, acknowledging that the Commander-in-Chief may, as such, under the Constitution, without legislation, "do whatever is necessary and is sanctioned by the laws of war to accomplish the lawful objects of his command," and that he may declare martial law, you proceed to state that this "authority must find early limits somewhere."

There is no need to discuss these matters here. The rest of what you address to us is as follows:—

"What, then, is his authority over the persons and "property of citizens? I answer, that, over all per- "sons enlisted in his forces, he has military power and "command; that over all persons and property *within* "*the sphere of his actual operations in the field* he may law- "fully exercise such restraint and control as the suc- "cessful prosecution of his particular military enter-

"prise may, in his honest judgment, absolutely require; "and upon such persons as have committed offences "against any article of war, he may, through appro- "priate military tribunals, inflict the punishment pre- "scribed by law; *and there his lawful authority ends.*"

For this you state no reasons, you adduce no authority whatsoever. You see, then, that you rest all you say on those two words, "I answer."

You do, indeed, say that if the Commander-in-Chief prescribes rules for future action, or for citizens outside of his lines, he is a legislator; but these are only making direct application of your position.

You see, then, and on reviewing what you have addressed to the people and President, will concede that, after all, what you urge does not derive any special weight from your studies and reflections as a lawyer; but results in question of fact on which your conclusions in these dark and dangerous times are as likely to be colored as those of other men.

When therefore you ask, in summing up, "Whence do these edicts spring?" and answer yourself in these terms, "They spring from the assumed power to extend martial law over the whole territory of the United States; a power for the exercise of which, by the President, there is no warrant whatever in the Constitution," you must know that you are declaring a matter for which you bring no proof, no authority; for which, indeed, there is nothing but your answer to a plain question, which any one whom you address can answer for himself.

But, without discussion of your answer in other particulars, wherein it would be easy to point out errors, do you not see that instead of warranting your sweeping condemnation of these "Edicts," as you would brand

them, your own answer to your own statement of the question, on your own law, sustains them all fully, as "*constitutional acts of the Commander-in-Chief?*"

What, pray, is the sphere of his actual operations in the field? Unhappily the field of this dire war is the whole Union, and the ocean too. In every State there is the army, enlisted and in service. In every State there are traitors, and those aiding and abetting treason; and in treason all are principals. The sphere of his actual operations in the field is not only Bull Run or Antietam, but Washington, Baltimore, New Orleans, St. Louis, Boston.

If there be an organized secret body, bound, not to bear arms, but with voice, and pen, and purse, scattered through the loyal States, where the sound of the drum and fife are not heard, to be busy in more dangerous and potent service of treason, is there no power to stop their nefarious and parricidal arm? no efficient, instant military power, I mean?

Agree, that merely from the fact of war the Commander has no right to usurp the power to make such edicts for other ends. You do not even insinuate this, that the President does not honestly use this merely as a war power. The question is, who is to judge what falls within the sphere of his actual operations in the field? Suppose you were a traitor, instead of a patriot, and that the Commander-in-Chief knew that you were hired by Jefferson Davis to write this address, could he not reach you? Has not the Commander-in-Chief lawful power to stop a cargo of powder or shells going out of Portland or New York? Can he not rightfully arrest a spy or traitor in Chicago or Newburyport?

And, on the other hand, is it not simply absurd to say that he may take grain, and not free the men who

raise it; may not deprive the enemy of a force which is equal to more than a million of soldiers? It is altogether too technical to say that his Proclamation cannot go beyond his army in any such sense. Indeed, it is simply absurd. Martial law can be declared over a city without a soldier in every house.

If a Union army were encamped near Washington but did not actually occupy it, might not the Commander lawfully declare martial law, to protect it against intestine traitors assuming to control it by the machinery of civil power?

Must he sit with folded hands and see a band of conspirators in garb of civilians vote another State into open rebellion and war, because he has not occupation of that State with troops?

Sir, it would be to drop the substance for the shadow not to believe that these powers of war must accommodate themselves to the necessities of the case.

There is no parallel in history to the present war. War is waged by one great section of a country upon the rest, and upon the government, to coerce the people to yield to its schemes for illegal extension of an institution which must destroy the nation utterly or surrender its pretensions.

You yourself quit a high post of duty, being impotent to resist the usurpations of that power under the form of law, for you knew it to be a plain fact, that colored persons were citizens under the Constitution, as such actually voted in North Carolina till 1837. So we thought. But you now ask the Commander to reject, or the Congress to snatch from him, powers which, in the honest exercise of his sworn duty, he has in time of war used to resist the encroachments of that power in open arms.

You call on the legislative to resist the executive power. You call on the people to refuse to obey their Commander-in-Chief. Is this the part of loyalty? Why should he or we thus abandon our duty in this hour?

What is the "particular military enterprise," and what does its successful prosecution absolutely require? This too you refer, as logically you must, to "*his honest judgment.*" Allow it to be, as you state in another connection, to assert the rightful authority of the Constitution and laws of their country over those who refuse to obey them, what does the successful prosecution of that enterprise absolutely require? If the Commander-in-Chief, in the exercise of his honest judgment, thinks Emancipation, then by your own argument that is his sworn constitutional duty.

So, sir, you see that this grandest of national powers, the highest war power, that which in places invested by the army is essentially arbitrary, and which, only as this present civil war may grow in its proportions, and precisely as it shall extend, must enlarge with them and approach to actual dictatorship, has a lawful constitutional basis. In it and by it the whole nation in war acts with one will as one man.

This power, which the founders granted, to be used in its extreme in the direst exigencies of war, perhaps having no distinct anticipation of any, and certainly no dream of such civil war, but thought to be necessary to preserve our liberties and nationality against foreign foes, has come to the most glorious of uses. It seems, to use your language, as "if the entire social condition of nine millions of people had, in the providence of God, been allowed to depend on the executive decree of one man." You justly say, "It will be the most stupendous fact which the history of the race has exhibited."

What you look to with such forebodings, we hail with joy and thanksgiving. You have proved that it is constitutional and lawful. The slave power, in time of peace, with the aid of parties, and through the complex and secret machinery of various departments of government, was by irresistible forms of law, under the Constitution, leading the country fast to certain ruin. It drew the sword. Then, as you show, the Commander-in-Chief was sworn to draw the sword against it. If that power shall perish by the sword; if the law of war — war which they made — shall be the means of the prospective or immediate, total or partial, extinction of the slave power, it will be worth to the country, and to the world, as well as to the slaves, all it can cost, — cost what it may of treasure, or, as you say, "of bloodshed and worse than bloodshed."

We are not troubled, either, with your lucid statement that military power is a power to act, and not a power to prescribe rules for future action, for it is but fair, as well as expedient, to give notice beforehand what will be his action, and give them a chance to modify theirs accordingly. It takes time. An order, which, in a single house, could be given on an instant's notice, requires longer time to be promulgated through a large city like New Orleans, longer yet through an extensive department. This seems short notice enough for so many States.

It is not declaring a penalty for their future action. It is notifying the rebels when this act will take effect, unless they remove *existing* causes; for the President has already by law proclaimed what States *are* in rebellion. Do you think it right to speak of the acts of the President as done in what he "may perhaps regard as having some flavor of the spirit of the Constitution?" I do not.

Furthermore, you make no discrimination. You do, indeed, print as a preface extracts from the emancipation Proclamation of Sept. 22; the martial law Proclamation of Sept. 24; and the orders of the War Department thereunder of Sept. 26, with a line of alleged statement to the Chicago delegation; you state what you regard as the legal effect of them; but you include all in one sweeping condemnation; and for this reason, as you state, that the powers of the constitutional war-right to declare martial law do not extend over the territory or the persons embraced in them.

But of this fact who is made the lawful judge?. Do not your studies and reflections satisfy you that the President was the lawful judge of the necessity on which he first acted in calling out troops under the old statute of 1795?

Do you really think or hope to make the Commander or the country think that any subordinate, private, civilian or Congressman has the right to judge what the successful prosecution of this military enterprise demands, or that any one can define the lines and limits of military operations save the Commander-in-Chief? Can Congress declare there shall be no martial law save in the army encamped on the Potomac? Perhaps they may, if by law it is their right, if they can by law confine all operations of the rebels within that locality, prevent all aid and comfort to them elsewhere, secure ample force on that spot to meet them, and ensure peace everywhere else. But they cannot otherwise do it.

But is it the right of Congress? Certainly not, you concede, when you say the Commander-in-Chief may himself declare martial law.

But if it were the right of Congress, and within

their power, would it not, on your own ground, be clearly their duty not to do it? Congress has power "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the government of the United States, or in any department or officer thereof."

Now you admit there are exigencies in which the Executive must assume the responsibility of a "necessary exercise of mere power," and may justly look for indemnity, which should be always accorded upon the clearest admission of legal wrong. Of course, then, Congress would be bound to ratify what he has honestly done, believing himself to have the lawful right to do it.

But this, too, need not be followed further, for the reason that Congress, at the two recent sessions, did enact laws, of which, with others, you take no notice, which to a great extent would, if it were needed, warrant the declaration of martial law; and for the reason that it is not true, in fact, that the Proclamation does establish martial law over all the people of the United States. The Statute, ch. 195, makes it the duty of the President to seize all the estate of any person owning property in any loyal State who shall give aid and comfort to the rebellion. May he not appoint provost marshals to do that service?

Moreover, you admit that the Commander-in-Chief has power to declare martial law, and the proclamation of Sept. 24, and the orders under it, only puts under martial law those in the United States affording aid and comfort to the enemy against the United States. Your complaint then is that he has not put the whole people under the law, but traitors alone.

But is it so plain that this is not just the case in

which he ought to keep the wheels of civil government in motion for those who hold to their allegiance, but sweep into the net of military power those who are guilty of treason? It seems as if this military sifting of the people were the very thing needed now. Were we at war with France, there would be obvious lines of nationality and locality. Now, when foes and friends are mixed together, this is impossible, and he puts the traitors under martial law as a distinct class. Would you rather, because the draft is resisted in one district in Pennsylvania, because one merchant in New York ships munitions of war to the enemy, or one man in Boston is furnishing them more material aid and comfort, that all Pennsylvania, New York, and Massachusetts were put under martial law, than that the guilty ones alone should suffer?

No, Mr. Curtis; the course you urge on us, the plan you seek to aid for Congress, is not the true course. Frankly, it must be said the course you take is not the one you ought to follow when you seek to "act for your country."

What you call the people to do is not the cause of the Constitution and the law. It would lead to anarchy.

Indeed, sir, you, who make this appeal, ought, as much as any man, to consider that it is of vital importance that the people feel and know that what is done in this hour is not done because we are in a state of anarchy; does not rest on the acquiescence of the country from an overwhelming necessity, but is well grounded in the Constitution and laws. Is not this the secret of the conscious strength of the nation? And what is the tendency of your counsel but to shear it of this strength, and make it the laughingstock of the world?

No, Mr. Curtis; the people will not, when you concede that these steps are from lawful authority, be guilty of the unpatriotic folly of trying to tie the hands of the President because you think that in the exercise of lawful power he has not held to the division of things or the ends of the war which meet your sanction; and it is to be hoped that the President will not convict himself of the fickleness or weakness with which you seem to think he moves.

It is quite natural that you should think that he should, even in war, hold to the compromises of 1850; at any rate, the most charitable construction of your advice is to suppose that you view things from the position of a supporter of those measures. You "severed your old party connections." But you mistake in saying that you never resumed them. You do now resume them. This act of yours you must know to be the most efficient aid you can render to the opposition seeking to organize itself against the Commander-in-Chief, and, in time of war, that is to array a force against the government and the country itself.

There are many things in what you have addressed to us which are open to remark and censure besides those here alluded to, — intimations as to the President, and intimations as to the policy of the government; some express and many covert intimations, and many expressions which you would censure in another, and which are more censurable in you.

Do you think you keep within the range of dispassionate discussion when you speak of the President acting "by his mere will;" "violating the laws by physical force;" "violating his oath of office;" "borrowing weapons from the armory of military power;" of his "edicts" and "delegating his mastership to satraps;"

when you talk of "mere executive control," "penal edicts," "consuming principles of liberty," "making himself a legislator;" reminding Congress what it may do "in thirty days," saying to the people that "he cannot effect any fatal mischief if they be right?"

What do you mean by your adroit profession of fairness in assuming that he wishes such discussion as this? Why do you so parade one change of his counsels and ironically charge him with fickleness? What do you mean when you say "Since Charles I. lost his head, there has been no king in England who could make such laws?"

Do you mean to say if a king of England lost his head for such law *a fortiori* should a President? The cases have no parallel, but you seem to hint they ought to have this.

Why do you say you "fear no present application of this Proclamation and these orders," in such terms that men will be as likely to construe it a challenge as a mere statement of your reliance on the expectation of the President that all these questions were open to the people, and of your own freedom from bias, and your honest wish and actual aim to support the government?

I must say, in all due respect, but with the plain truth the time calls for, these may be read as showing evil intent. I think it comes from your bias.

It is very clear that if these powers be not applied in the present case (for, though wrong in you to open the discussion, it may be expedient to let it when open be exhausted, if only to show how well grounded is the power of the nation in war), your own charge concerning the fugitive slave bill to the grand jury, "that the "law does not permit influential persons to incite igno-

" rant, unreflecting or desperate men to action, and then " retire and await in safety the result of the violence " they cause. To permit this would not only be incon- " sistent with sound policy, but with a due regard to " the just responsibilities of men. The law does not " permit it. They who have the wickedness to plan " and incite, and aid, and who perform any part, how- " ever minute, are justly deemed guilty of this offence, (treason)," — might with infinitely more reason, and no extension of the law or facts beyond those in that case, be applied to you should violence ensue. I know you do not intend this. Nor did they; " Oh no, they counselled no violence." But your own rule was advice intended to incite, and, inciting, rendered the counsellor responsible for violence which followed.

These, however, it is not worth while to point out further. It is enough to enter a protest against them.

You seem to have had a lurking consciousness of the fallacy of your work when you chose for it the title — Executive Power; the very words the founders rejected to substitute in lieu of them the terms Commander-in-Chief. You assume to intimate very much, to us and to the President, in dedicating your argument to those who have sworn to support the Constitution; much when you address yourself to citizens who value the principles of civil liberty which it embodies; and more yet when you affirm that that Constitution is the only security for the preservation of those principles.

Perhaps you mean that you fear that the powers given may be used for the end of emancipation, instead of that being a means for the objects of the war. Do not fear that. The people will not go beyond the letter of the law. But in this hour, when they are dividing into those who favor and those who oppose the en-

croachments of the slave power, do not ask any but those who openly or covertly favor that power to take the course you point out. The principles of civil liberty embodied in the Constitution will be worked out under it, not at all as you advise, but in the only course worthy of a nation, the leadership of the Commander-in-Chief, sustained by the united efforts of a loyal people and a loyal legislature ; by the responsible performance of the high duties intentionally vested in him as Commander-in-Chief, by the Constitution granted to him in those terms, as embracing all those powers without which (as was justly remarked by one in the discussion about conferring them) "perhaps the independence of America would not have been established."

Sir, we believe the President, whilst mindful of his oath in not going beyond the Constitution, will remember how it binds him to do his duty, and not fear nor falter in using those great war powers given him by the Constitution as Commander-in-Chief, and (as he is honest, as you admit) we stand before the country, before the world, and before our God, and say we will keep our oaths, and call on you to keep yours, and as a good citizen give to him your unconditional support.

Your fellow-citizen,

LIBERTAS.

Boston, October 21, 1862.

APPENDIX.

1. *Mitchell vs. Harmony*, 13 *Howard*, 115, is one of the cases cited by Mr. Curtis.

Mr. Curtis states that the Supreme Court decided that a commanding general "has the right to appropriate private property to the public service." The marginal note states also that the Court decided that he might take it "to prevent it falling into the hands of the enemy."

Chief Justice Taney further stated that "*if a citizen be found engaged in illicit traffic with the enemy, his goods are liable to seizure and confiscation*," and "if preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified."

They decided another thing in the words of the marginal note, — "*the facts as they appeared to the officer must furnish the rule for the application of these principles.*"

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2. *Luther vs. Borden*, 7 *Howard*, 1, is the other case cited.

What Mr. Curtis cites is an extract from the dissenting opinion of J. Woodbury.

The Supreme Court fully sustained martial law as declared by Rhode Island, in its civil war, in the words of Chief Justice Taney, as "*a power essential to the existence of every government, essential to the preservation of order and free institutions, and as necessary to the States of this Union as to any other government.*" "The State itself," says the Chief Justice, "must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this Court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things, the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, where there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

The Chief Justice said, too, that under the statute of 1795 the President was the sole and final judge of the exigency requiring him to call out the militia. He pertinently asked, — "After the President has called out the militia is a Circuit Court of the United States authorized to inquire whether his decision was right?" and replied, — "If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, not of order." This was the statute under which President Lincoln made his first call.

Accordingly, the Supreme Court laid down the rule that "wherever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

Mr. Curtis admits that our Constitution gives to the Commander-in-Chief the power to declare martial law, which he thus defines: "The will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends."

But Mr. Curtis says, — "This power must have limits somewhere." His whole argument on this subject rests on his assumption that Congress or the people are to judge of the limits. The Supreme Court has decided the very opposite principles.

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3. It is worth noting that the power to suspend the *habeas corpus* has not in so many terms been given either to the executive or legislative department. The whole argument to show that it does belong to the legislative rests on the assumption that article 1, section 9, is an enumeration of prohibitions on Congress alone. Is this clearly so? The prohibition that "no money shall be drawn from the treasury but in consequence of appropriations made by law," and that "no person holding any office," &c., shall "accept of any present, title," &c., seem to have no such application.

Moreover, if Congress might by law provide for it, would it follow that the Commander-in-Chief could not in war do it?

This power is in its nature *executive*. It eminently pertains to the national military head as a war power to the Commander-in-Chief.

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4. The questions as to the despotic power of the King of England as a prerogative of his royal authority in time of peace, and as part of the civil government, to establish commissions-courts, and subject the subject to martial law or trial by any but the regular process of law, have no sort of application to this subject.